

**OCT 19 2005**

**CATHY A. CATTERSON, CLERK**  
**U.S. COURT OF APPEALS**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

V.

ROBERT R. DEARINGER,

Defendant - Appellant.

No. 04-30530

D.C. No. CR-04-00361-MJP

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the Western District of Washington  
Marsha J. Pechman, District Judge, Presiding

Submitted October 17, 2005<sup>\*\*</sup>  
Seattle, Washington

Before: CUDAHY<sup>\*\*\*</sup>, T.G. NELSON, and McKEOWN, Circuit Judges.

Robert R. Dearinger appeals his sentence of 100 months in prison following his plea of guilty to bank robbery in violation of 18 U.S.C. § 2113(a).

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<sup>\*</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

<sup>\*\*</sup> This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

<sup>\*\*\*</sup> The Honorable Richard D. Cudahy, Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

Dearinger argues that the district court committed nonconstitutional error by sentencing him under the mandatory United States Sentencing Guidelines (“U.S.S.G.”) in violation of United States v. Booker, \_\_ U.S. \_\_, 125 S.Ct. 738, 756-57 (2005). Because Dearinger preserved the Booker error, we review for harmless error. See United States v. Seschillie, 310 F.3d 1208, 1214 (9th Cir. 2002). Under the harmless error standard, the government failed to meet its burden to establish that “it is more probable than not that the error did not materially affect the verdict.” See id. Although the district court departed downward from the Guidelines range, the record is insufficiently clear to conduct a complete harmless error analysis. Cf. United States v. Ameline, 409 F.3d 1073, 1074-75 (9th Cir. 2005) (en banc). Therefore, we will apply the limited remand procedure approved in Ameline.

Dearinger also appeals the district court’s finding that his prior convictions are predicate offenses under U.S.S.G. § 4B1.1. The argument that his prior convictions are not for crimes punishable for a term exceeding one year is foreclosed under United States v. Murillo, \_\_ F.3d \_\_, 2005 WL 2174415, at \*3 (9th Cir., Sept. 9, 2005). In Murillo, we held that “the maximum sentence that makes a prior conviction under state law a predicate offense under 18 U.S.C. § 922(g)(1) remains, after Blakely, the potential maximum sentence defined by the

applicable state criminal statute, not the maximum sentence which could have been imposed against the particular defendant for his commission of that crime according to the state's sentencing guidelines.” Id. The Murillo analysis controls the interpretation of predicate offenses under U.S.S.G. § 4B1.1, as well. The statutory maximums for Dearing's prior convictions well exceeded one year. Accordingly, the district court did not err in finding that Dearing's prior convictions are predicate offenses under U.S.S.G. § 4B1.1.

The career offender finding is **AFFIRMED**, and the sentencing decision is **REMANDED** for limited reconsideration consistent with Ameline. In fulfilling this mandate, the district court may hold such hearings and enter such orders as it determines to be necessary, including, without limitation, modifying or vacating its previous sentence.